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In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD ROSENSTEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a municipality can be held liable under 42 U.S.C. §1983 for an unconstitutional policy or custom of failing to provide a name-clearing hearing to a discharged probationary employee when the only evidence of such a policy is a single incident in which the discharged employee failed to request a hearing.

2. Whether, in an action under 42 U.S.C. §1983 for denial of a name-clearing hearing, a discharged probationary employee is entitled to recover damages for general loss of reputation.

3. Whether a police chief can be considered a policymaker under 42 U.S.C. §1983 when his actions and decisions are subject to supervision and control by the city manager and ultimately by the city counsel.

4. Whether the district court erred in failing to submit to the jury a special issue to determine whether the discharged employee requested a name-clearing hearing.

5. Whether the district court committed plain error by submitting damages issues disjunctively thus allowing recovery for denial of a name-clearing hearing or for slander.

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HOWARD ROSENSTEIN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of Dallas, Texas respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 21 – App. 29) is reported at 901 F.2d 61. The opinion of the panel of the court of appeals (App. 1 – App. 20) is reported at 876 F.2d 392. The judgment of the district

court (App. 30) and order of the district court denying petitioner's motion for new trial, motion for judgment n.o.v. and motion for partial judgment (App. 31) are unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on May 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides:

> No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; * * * .

2. Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, *** subjects, or causes to be subjected, any *** person *** to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * * .

STATEMENT OF THE CASE

In March 1984, Amy Bradley, a Dallas police officer, received several harassing and obscene telephone calls. Bradley named Respondent Howard M. Rosenstein, a fellow police officer, as the person who made the calls. An Internal Affairs Department investigation concluded that Rosenstein had made the calls, and Rosenstein was terminated from his position as a Dallas police officer. Rosenstein had been employed by the City of Dallas for less than one year and was a probationary employee at the time of his termination. Shortly thereafter, police Captain Donald Milliken made public the charges against Rosenstein in statements to the press concerning the discharge. Rosenstein sought to challenge the decision of the police department to terminate him. Rosenstein's request for an appeal stated: "On May 10, 1985, I was fired from the Dallas Police Department for something that I did not do. I received the formal written confirmation of my termination from Chief Prince on May 14, 1985. I hereby request an appeal from this decision." Rosenstein was denied further consideration or hearing on the ground that no appeals procedure was available to one in his status as a probationary employee.

Rosenstein denied that he made the telephone calls and brought this action in the Northern District of Texas seeking damages for violation of his constitutional rights pursuant to 42 U.S.C. §1983 and for violations of state law. Rosenstein's §1983 claim was based principally upon the City's alleged failure to provide a name-clearing hearing to him. His state law claims for slander were based on the statements of Captain Milliken. The jurisdiction of the district court was invoked under 28 U.S.C. §1343.

The case proceeded to trial on Plaintiff's consolidated claims and was submitted to the jury. Petitioners submitted to the trial court a special issue regarding whether a name-clearing hearing had been requested by Rosenstein. Petitioners also submitted proposed jury instructions defining policymakers and explaining that municipal liability must be based on official policy. The trial court refused to submit these issues and instructions to the jury and City of Dallas objected. The jury returned a verdict in favor of Rosenstein and the district court entered judgment upon the jury's verdict. The City of Dallas filed motions for partial judgment, and for judgment notwithstanding the verdict or, alternatively, for a new trial. The district court denied the City's motions, and the City appealed.

A divided panel of the court of appeals vacated the judgment as to Rosenstein's slander claim and the award of punitive damages for slander, upheld Rosenstein's recovery on his civil rights claim and remanded for modification of damages and attorney's fees. (App. 1 - App. 20). The panel majority specifically held that, "in a §1983 action for denial of a name-clearing hearing, the Plaintiff's damages for loss of the opportunity to clear his name of false and defamatory charges include any harm to his reputation and career." (App. 10). The panel majority also implicitly held that the Chief of Police was a final policymaker for the City of Dallas. (App. 7 - App. 8).

On July 12, 1989, Petitioner requested a rehearing en banc of the panel's decision. The court of appeals granted en banc review on September 7, 1989. On May 14, 1990, a sharply divided en banc court of appeals reinstated the opinion of the panel majority with the exceptions of the

language in the opinion discussing damages and one footnote relating to the standard for implicating a liberty interest in public employee discharge cases. (App. 21). Although the en banc court refused to adopt the panel majority's language regarding recovery of damages to one's reputation, the court did adopt the panel majority's result awarding such damages. The en banc court also adopted the panel majority's holding regarding jury issues and instructions.

REASONS FOR GRANTING THE PETITION

This Court should grant the City's petition for writ of certiorari because (1) this case involves significant issues of national importance; (2) the court of appeals decision constitutes a serious deviation from this Court's prior rulings; and (3) this case impermissibly expands municipal liability under 42 U.S.C. §1983.

A. THE RULES ANNOUNCED BY THE COURT OF APPEALS

The en banc court of appeals decision has the effect of announcing the following rules:

> (1) A probationary municipal employee's request for an appeal of his discharge shall always be deemed an implied request for a name-clearing hearing.
>
> (2) Even though a probationary municipal employee has no property interest in his employment and is not entitled to appeal his discharge, a municipal employer's legitimate refusal to grant a probationary employee's

request for an appeal of his discharge shall always be deemed a refusal to grant the employee's implied request for a name-clearing hearing.

(3) A municipality shall be deemed to have an official policy of refusing requests for name-clearing hearings if one such incident occurs in which an implied request is deemed refused. One such incident shall be deemed official municipal policy even if the refusal is made by a city employee whose actions are subject to supervision and control by the city manager and city council.

(4) A person who has been denied the opportunity to have a name-clearing hearing is entitled to recover damages for his general loss of reputation even though the failure to provide such a hearing did not cause the loss of reputation.

B. SIGNIFICANT ISSUES OF NATIONAL IMPORTANCE

This case involves significant issues of national importance such as a municipality's right to adequate notice of a request for a name-clearing hearing, the requirements to establish official municipal policy under 42 U.S.C. §1983 and the damages available to one who has been denied a name-clearing hearing.

As a result of the court of appeals decision, municipal employers will no longer be afforded the fundamental right of reasonable notice. Municipal employers will be left to guess whether a discharged employee has put them on notice of a request for a name-clearing hearing. The guessing game involves a great deal of peril for

municipalities since a single wrong guess can translate not only into a deemed refusal of a particular implied request, but can now provide sufficient evidence to establish an official municipal policy of refusing all requests for name-clearing hearings thus subjecting the municipality to damages and attorney's fees under 42 U.S.C. §1983. The peril to cities is only heightened when one realizes that, as a result of the court of appeals decision, the damages available to one denied a name-clearing hearing include losses to the discharged employee's general reputation.

C. DECISION DEVIATES FROM THIS COURT'S RULINGS

The court of appeals decision deviates from several of this Court's prior rulings. First, the decision is contrary to *Perry v. Sindermann*, 408 U.S. 593, 603 (1972) which held that an employee is entitled to a hearing *if he requests one*. *See also Owen v. City of Independence*, 445 U.S. 622, 633, n.13 (1980). The court of appeals decision commands that a name-clearing hearing be granted to a discharged employee even though that employee never requested such a hearing.

Second, the decision is contrary to *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). *Pembaur* held that in order to hold a local government liable, a plaintiff must establish that the government official had *final* authority to establish municipal policy with respect to the action taken or ordered. *Pembaur*, at 481. *Praprotnik* held that if the decision of an official is subject to review, that official

is not a policymaker. *Praprotnik*, at 126. The court of appeals decision in this case violates *Pembaur* and *Praprotnik* by finding a municipality liable under 42 U.S.C. §1983 for the single act or decision of a police chief whose actions or decisions are subject to review by the city manager and city council. Finally, the decision is contrary to *Paul v. Davis*, 424 U.S. 693 (1976) and *Carey v. Piphus*, 435 U.S. 247 (1978). *Paul* held that reputation alone is not a protected liberty interest. The court of appeals decision deviates from *Paul* by allowing recovery for general loss of reputation. *Carey* held that constitutional damages must flow from the constitutional right infringed, i.e., that the remedy must fit the right. *Carey*, at 258-59. In the present case, the right involved is the procedural right to have a name-clearing hearing. The name-clearing hearing is designed to ensure that the discharged employee has the liberty to seek other employment without government interference. For the denial of a procedural right that implicates a liberty interest, the court of appeals has fashioned a remedy that implicates a non-existent property interest. Beside the fact that Rosenstein's liberty interest in other employment was never jeopardized, the failure to provide Rosenstein with a name-clearing hearing was simply not the cause of any loss he suffered to his reputation. If Rosenstein suffered any loss of reputation, it was because of statements made about him by Captain Milliken *not* because he was denied a name-clearing hearing. The court of appeals decision, contrary to this Court's holding in *Carey*, improperly allows Rosenstein to recover damages that were not caused by his alleged constitutional deprivation.

D. EXPANSION OF MUNICIPAL LIABILITY

The court of appeals decision expands municipal liability in several ways. First, cities will no longer be able to depend on receiving reasonable notice of what type of review or hearing a discharged employee is seeking. Unless cities give every discharged employee a name-clearing hearing, they will be subjecting themselves to liability. Second, the single decision of a city employee will now be sufficient to establish official municipal policy even though that employee's decision is subject to review by higher-ranking city officials. Third, a city will now be liable to discharged employees for losses those employees suffer to their general reputation even if the city's alleged constitutional violation did not cause the employee to suffer a loss to his reputation. Finally, the court of appeals decision puts the City of Dallas in the peculiar position of paying damages to Rosenstein for a cause of action for which he is not entitled to recover. Because the district court improperly submitted the issue of damages to the jury in the disjunctive – allowing reputational damages to be awarded for slander *or* for a denial of a name-clearing hearing – it is impossible for a reviewing court to sort out which damages are properly associated with the slander cause of action and which with the denial of the name-clearing hearing. As a result, although the court of appeals dismissed the slander cause of action, it could not dismiss the slander damages award. The result is unjust for the City of Dallas and disturbing for cities nationwide. Because it obscures the causal connection required between Rosenstein's causes of action and the damages available for those causes, the

court of appeals decision is a defacto expansion of municipal liability under 42 U.S.C. §1983. This expansion of municipal liability, a direct result of the plain error contained in the jury instructions, is an obvious instance of injustice or misapplication of law that calls for this Court's review. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). This Court should not allow the court of appeals decision to remain in effect since it awards damages on a claim for which Rosenstein has no right to recover.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Assistant City Attorney

August 1990.

App. 1

Howard M. ROSENSTEIN,
Plaintiff-Appellee,

v.

The CITY OF DALLAS, TEXAS,
Defendant-Appellant.

No. 87-1888.

United States Court of Appeals,
Fifth Circuit.

June 28, 1989.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and JOLLY, Circuit Judges.

REAVLEY, Circuit Judge:

This appeal challenges a judgment against the City of Dallas for violation of the plaintiff's due process rights under federal civil rights law and against Donald Milliken and the city for slander under state law. We vacate the judgment, upholding the recover on the civil rights claim, and remand for modification of damages.

In March 1984, Amy Bradley, a Dallas police officer, received several harassing and obscene telephone calls. Bradley named the plaintiff, Howard M. Rosenstein, a fellow police officer, as the person who made the calls. An Internal Affairs Department investigation concluded that Rosenstein had made the calls, and Rosenstein was terminated from his position as a Dallas police officer. Rosenstein had been employed by the City of Dallas for less than one year and was a probationary employee at

the time of his termination. Shortly thereafter, police Captain Milliken made public the charges against Rosenstein in statements to the press concerning the discharge. Rosenstein sought to challenge the decision of the police department but was denied further consideration or hearing on the ground that no appeals procedure was available to one in his status as a probationary employee.

Rosenstein denied that he made the telephone calls and brought this action in the Northern District of Texas seeking damages for violation of his constitutional rights pursuant to 42 U.S.C. § 1983 and for violations of state law. Rosenstein's § 1983 claim was based principally upon the city's denial of a name-clearing hearing to him. His state law claims for slander were based on the statements of Captain Milliken. After trial of the plaintiff's consolidated claims against the City of Dallas and Captain Milliken, the court entered judgment on the jury verdict in favor of Rosenstein.

The Denial of a "Name-Clearing" Hearing

It is now beyond any doubt that discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name. *See Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976); *Paul v. Davis*, 424 U.S. 693, 710, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971); *Wieman v. Updegraff*, 344 U.S. 183, 191, 73 S.Ct. 215, 218, 97 L.Ed.

216 (1952). We have held that public officials do not act improperly in publicly disclosing charges against discharged employees, but they must thereafter afford procedural due process to the person charged. *In re Selcraig*, 705 F.2d 789, 798 (5th Cir.1983). Moreover, the process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee. *Roth*, 408 U.S. at 573 n. 12, 92 S.Ct. at 2707 n. 12. If a government employer discharges an individual under circumstances that will do special harm to the individual's reputation and fails to give that individual an opportunity to clear his name, however, the individual may recover monetary damages under § 1983 for the deprivation of his liberty under the Fourteenth Amendment. *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13, 100 S.Ct. 1398, 1406 n. 13, 63 L.Ed.2d 673 (1980). To succeed on this § 1983 claim for the denial of a name-clearing hearing, the employee must prove the following: that he was discharged,[1] that defamatory charges[2] were made

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[1] Reputation alone is not a constitutionally protected interest. *Paul v. Davis*, 424 U.S. at 701, 96 S.Ct. at 1160-61; *White v. Thomas*, 660 F.2d 680, 684 (5th Cir.1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982). Reputation must be impugned in connection with the termination of employment. *Paul v. Davis*, 424 U.S. at 710, 96 S.Ct. at 1165.

[2] *See Codd v. Velger*, 429 U.S. 624, 628, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977). The Supreme Court has made clear that a liberty interest arises in this context if the charges put one's reputation at stake, impugn one's good name, honor, or integrity or impose a stigma that will foreclose freedom to take advantage of other employment opportunities. *See Roth*, 408

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U.S. at 573, 92 S.Ct. at 2707. Settling on a term that adequately characterizes the type of charges which give rise to a liberty interest under *Roth* has been a source of much difficulty for this court; our choice of the term "defamatory" is deliberate. In the past we have usually employed the term "stigmatizing." *See Campos v. Guillot*, 743 F.2d 1123, 1126 (5th Cir.1984). Stigma, however, has not proven to be a concept capable of much precision. At times we have attempted to supplement "stigmatizing" with the notion of "a badge of infamy." *See Evans v. City of Dallas*, 861 F.2d 846, 851 (5th Cir.1988); *Ball v. Board of Trustees of Kerrville Independent School Dist.*, 584 F.2d 684, 685 (5th Cir.1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1535, 59 L.Ed.2d 788 (1979). At other times we have suggested that "stigmatizing" requires the plaintiff to prove that "her employment or employment opportunities were damaged in addition to her reputation," *Myrick v. City of Dallas*, 810 F.2d 1382, 1385 (5th Cir.1987), or that "the claimant must show that damage to his reputation and employment opportunities has in fact occurred." *Evans*, 861 F.2d at 851. Our efforts to define "stigmatizing" have only led us further from the meaning of *Roth*.

The dissent accuses us of attempting "to obliterate the term 'stigmatize' from the printed books." We have not been so bold. We do believe that the term "stigmatize" has proven unnecessarily confusing, but by characterizing the type of charge the triggers a liberty interest as "defamatory," we in no way change the law. The meaning of "defamatory" is well settled and familiar; it better addresses the range of meanings intended by the Supreme Court; and it provides better direction for trial courts. Furthermore, our use of the term "defamatory" in this manner is hardly unprecedented. *See Owen v. City of Independence*, 445 U.S. at 633 n. 13, 100 S.Ct. at 1406 n. 13; *Paul v. Davis*, 424 U.S. at 709, 96 S.Ct. at 1164; *Lyons v. Barrett*, 851 F.2d 406, 410 (D.C.Cir.1988); *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1495 (9th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988); *White v. Thomas*, 660 F.2d at 684; *Dennis v. S & S Consolidated Rural High School District*, 577 F.2d 338, 341 (5th Cir.1978). The Seventh Circuit has held that if a claim does not succeed in alleging "actionable defamation," *"a fortiori* it does not allege a violation of the Constitution." *Clark v. Maurer*, 824 F.2d 565, 566 (7th Cir.1987).

against him in connection with the discharge,[3] that the charges were false,[4] that no meaningful public hearing was conducted pre-discharge[5], that the charges were made public,[6] that he requested a hearing in which to clear his name,[7] and that the request was denied.[8]

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[3] The charges must be connected with the discharge but need not actually cause the discharge. *Owen*, 445 U.S. at 633 n. 13, 100 S.Ct. at 1406 n. 13; *Wells v. Hico Independent School Dist.*, 736 F.2d 243, 256 n. 17 (5th Cir.1984), *cert. denied*, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985). We emphasize, however, that the charges must be more than merely adverse; the charges must be the type that might seriously damage the employee's standing and associations in the community, that blacken his good name or impair his employment opportunities. *See Wells*, 736 F.2d at 256 n. 16. Moreover, mere discharge, without specific defamatory charges, will not implicate a liberty interest even though it might make the employee less attractive to other employers. *Roth*, 408 U.S. at 574 n. 13, 92 S.Ct. at 2707 n. 13; *Wells*, 736 F.2d at 256.

[4] *Codd*, 429 U.S. at 628, 97 S.Ct. at 884.

[5] *Campos*, 743 F.2d at 1126.

[6] *Bishop v. Wood*, 426 U.S. at 348-50, 96 S.Ct. at 2079-80; *Campos*, 743 F.2d at 1126. An employee may prove that the government agency is likely to make the charges public or that information about the charges is available to the public, although not publicized by the government. *See Wells*, 736 F.2d at 256. There will be no liability, however, if the agency has carefully kept the charges confidential and the plaintiff caused them to be made public. *Campos*, 743 F.2d at 1126.

[7] *Campos*, 743 F.2d at 1126.

[8] A name-clearing hearing is not a prerequisite to publication, and the state is not required to tender one prior to disclosing the charges or discharging the employee. *In re Selcraig*, 705 F.2d at 796. The state deprives an employee of a liberty interest only when it denies his request for an opportunity to contest the charges and clear his name.

The city argues that the plaintiff did not request a hearing. It is undisputed, however, that Rosenstein requested access to the police department's established appeal procedure to contest the charges. On May 10, 1985, Rosenstein wrote to the Dallas City Manager that "I was fired from the Dallas Police Department for something that I did not do," and he "request[ed] an appeal from this decision." In this case where the only issue was Rosenstein's guilt or innocence of the particular charge that stigmatized him, his request to participate in established grievance, appeals, or other review procedures to contest defamatory charges was sufficient to state a request for a name-clearing hearing. A discharged employee need not use the term "name-clearing hearing." *Cf. Owen*, 445 U.S. at 626-29, 100 S.Ct. at 1403-04 (noting that fired police chief demanded only an appeal and was refused on the grounds that the city charter provided for no appellate procedure).

The governmental employer need not grant the discharged employee access to its established appeals procedures, but may provide an alternative procedure, or even an ad hoc hearing, solely for the purpose of allowing the employee to clear his name. An employer electing to implement a special procedure, however, must notify the discharged employee that it will give him access to the special name-clearing procedure if he chooses to take advantage of it; the state must "make known to the stigmatized employee that he may have an opportunity to clear his name upon request." *In re Selcraig*, 705 F.2d 789, 796 (5th Cir.1983). An employer's denial of an employee's request to appeal the employer's discharge decision, which rested on guilt of the stigmatizing charge, is a

denial of a name-clearing hearing unless the employer specifically notifies the employee of the availability of an alternative procedure, which will provide the employee with a public forum to clear his name before the governing body that discharged him.

Not only did the City of Dallas fail to notify Rosenstein that he might take advantage of some alternative or ad hoc hearing procedure, city officers made it perfectly clear that he would not be allowed any procedural avenue whatsoever to clear his name. In the letter formally discharging Officer Rosenstein and informing him of the charges, Police Chief Billy Prince stated: "Because you are a probationary employee of the Dallas Police Department, my decision in this matter is final." The City's response to Rosenstein's letter to the City Manager requesting an appeal concluded the matter by stating: "[I]n accordance with the Police Code of Conduct the decision of the Chief of Police is final. You were a probationary employee and therefore ineligible for further appeal rights." We need not reach the question of whether the jury instructions adequately stated all the elements of a claim for the denial of a name-clearing hearing because as a matter of law the record establishes Rosenstein's claim.

Municipal Liability

The City of Dallas complains of the district court's refusal to instruct the jury to the effect that the city's liability for the civil rights violation depended upon Rosenstein proving that the city council had delegated policy-making authority to the officer who denied him a name-clearing hearing. That instruction was unnecessary

in the state of this record. The Chief of Police testified that he set all of the policies for the police department, and the city attorney neither questioned the Chief upon that statement nor raised an issue to the contrary. The city is liable for the action of the official responsible for establishing policy with respect to the matter. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986). The hearing was denied although both the Chief of Police and the City Manager were aware of Rosenstein's desire for a hearing. There was no need to prove a city policy, although it was significant in this respect that the Assistant City Manager who had supervisory responsibility for the police department testified that he did not know what was meant by "name-clearing hearing."

The Slander Cause of Action

Rosenstein also sued under state slander law for damages caused by the publication of the defamatory charges. Under Texas law municipalities are granted broad immunity from liability when performing governmental functions. *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex.1986). A Texas court of appeals has recently held that defamation of a police officer by city officials in the course of discharging that police officer is protected under the city's governmental immunity and, as an exercise of a governmental function, is not actionable against either the city or the officials under state slander law. *City of Dallas v. Moreau*, 718 S.W.2d 776, 779-80 (Tex.App. – Corpus Christi 1986, writ ref'd n.r.e). This decision controls Rosenstein's state law claims, which must be dismissed.

Damages

The district court awarded damages to the plaintiff for lost earnings, mental anguish and suffering, harm to the plaintiff's reputation and career, and punitive damages against Captain Milliken. The Supreme Court has held that when only a liberty interest is infringed, the plaintiff is entitled to only nominal damages or to any actual damages, such as emotional distress, that can be proved to result from the infringement of the liberty interest. *Carey v. Piphus*, 435 U.S. 247, 260-63, 98 S.Ct. 1042, 1050-52, 55 L.Ed.2d 252 (1978). Rosenstein did not have a property interest in his job and may not recover damages for the loss of that job. The district court, therefore, should have disregarded as immaterial the jury's finding of $4087.10 in damages for lost earnings.

An employee may not recover directly under § 1983 for slanderous statements made by his employer, but he is entitled under federal law to a hearing to clear his name if the statements were made in connection with termination of his employment. We can find no appellate court opinion that directly addresses the question of whether damages to reputation are recoverable when a name-clearing hearing is denied.[9] At least two cases in

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[9] The rule of *Paul v. Davis*, 424 U.S. at 701, 96 S.Ct. at 1161, that reputation alone is not a constitutionally protected interest is not in point. The question presented in *Paul v. Davis* was what circumstances give rise to a right to a name-clearing hearing, not what are the damages for the denial of such a hearing. The Supreme Court did not overrule the holding in *Roth* that charges which blacken one's name, but do not necessarily cause the loss of employment opportunities, can constitute part of a claim for a

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this court have apparently assumed, without deciding, that damages for harm to reputation are recoverable in this type of action. *See In re Selcraig*, 705 F.2d at 798; *White v. Thomas*, 660 F.2d at 682. We hold that in a § 1983 action for denial of a name-clearing hearing, the plaintiff's damages for loss of the opportunity to clear his name of the false and defamatory charges include any harm to his reputation and career caused by the charges made against him that he is able to

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name-clearing hearing, rather the Court reaffirmed the holding in *Roth* that such charges give rise to a liberty interest only when made in the course of termination from public employment:

> While *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected to any refusal to rehire would be actionable under the Fourteenth Amendment. . . .

Paul v. Davis, 424 U.S. at 709, 96 S.Ct. at 1164. The Supreme Court specifically held that it was not sufficient to establish a claim under § 1983 "that there simply be defamation by a state official; the defamation had to occur in the course of the termination of employment." *Id.* at 710, 96 S.Ct. at 1165. The dissent's misreading of *Paul v. Davis* as holding that a plaintiff may only recover when the false and defamatory charges actually cause the employee to lose a subsequent job results from confusing the circumstances necessary to a trigger a liberty interest with the damages caused by the violation of the liberty interest.

prove.[10] The award of punitive damages, however, falls with the dismissal of the state law slander claim.[11]

Other Matters

Appellants urge that the § 1983 claim and the state law slander claim are separate and independent claims and that the district court erred by awarding attorneys'

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[10] The dissent notes that "in the years since the writing of *Roth*, the law has been refined to the point that, in a discharge case, the due process clause recognizes only the employee's liberty right not to have the government bar future employment opportunities. . . . " By "refined," of course, the dissent means that an important part of the *Roth* holding has been overturned. There is simply no authority to support that conclusion. In every case in which the Supreme Court has considered the issue the right of a discharged employee to clear his name of charges that blacken his reputation, in addition to charges that foreclose future employment opportunities, has been recognized. The language in the opinions of this court which might be read otherwise is dicta and did not even address the question of damages. The question presented by this case is a simple one; what are the damages when one is denied his Fourteenth Amendment right to *clear his name* of charges that *blacken his reputation*? We believe that the answer given here is the only possible one.

[11] Although the jury could have found the damages for harm to reputation under both the slander cause of action and the § 1983 action, our holding that the slander claim is barred by governmental immunity does not affect those damages. Although the jury was instructed that statements charging criminal activity were "slanderous *per se*," the jury was not instructed to presume damages for harm to reputation. Moreover, the record amply supports Rosenstein's claim that his reputation and standing in the community were harmed and that his career suffered.

fees for time spent on the now unsuccessful slander claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). Both claims share a common core of facts, and the damages theories for both claims are identical. We are not prepared to state that the district court's award of attorneys' fees was an abuse of discretion. *See Graves v. Barnes*, 700 F.2d 220, 221 (5th Cir.1983). Because the district court denied the defendants' motion for judgment n.o.v. and thus did not consider that the plaintiff had urged an unsuccessful claim, we cannot know whether the district court considered the appellants' arguments in awarding attorneys' fees. We therefore direct the district court on remand to reconsider its award of attorneys' fees in light of our holding that a judgment n.o.v. should have been entered on the slander claim.

The appellants also argue that the district court erred in denying their motion for new trial on the grounds that the court erroneously admitted irrelevant evidence concerning Officer Rosenstein's commendations, that the district court submitted an improper instruction to the jury regarding custom and policy, that the district court refused to submit a separate issue on whether Rosenstein requested a name-clearing hearing, and that the district court's errors confused the jury and prejudiced the defendants. Evidence of Officer Rosenstein's previous commendations was relevant as background and as evidence of his professional reputation, which was harmed by the stigma of the false charges. The appellants' other grounds are answered above.

The judgment is VACATED and the case is REMANDED to the district court for modification of

damages against the City of Dallas consistent with this opinion and for the award of attorneys' fees.

E. GRADY JOLLY, Circuit Judge, dissenting in part:

I respectfully dissent because I object to footnote 2 and because the majority allows recovery for damage to general reputation. I otherwise concur.

A.

I object to footnote 2 on two grounds; one is pragmatic, the other substantive. My first objection is that note 2 is dicta, and serves no purpose in resolving the case before us. Second, by its "deliberate" decision to obliterate the word "stigmatize" from the printed books and substitute the annointed term "defamatory" in its stead, I believe the majority has wrongly assumed the authority to rewrite earlier opinions of this court and the Supreme Court.

Judge Reavley is correct in his reading of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), to allow a discharged employee two avenues for complaining that his liberty interest has been implicated as a result of his discharge by a government employer: first, if the charge made against the employee "might seriously damage his standing and associations in his community," for example, a charge "that he has been guilty of dishonesty, or immorality," *id.* at 92 S.Ct. 2707; and second, if the state "imposes on him a stigma or other disability that forecloses his freedom to take advantage" of other comparable employment in his chosen profession.

However, I am convinced that in the years since the writing of *Roth*, the law has been refined to the point that, in a discharge case, the due process clause recognizes only the employee's liberty right not to have the government bar future employment opportunities by publicly assigning false reasons for discharge that stigmatize the employee in obtaining employment in his line of work. The reasons offered to support the employee's discharge must defame his professional competence in such a way as to characterize him as fundamentally unfit for that line of work.

In *Paul v. Davis*, 424 U.S. 693, 696, 96 S.Ct. 1155, 1158, 47 L.Ed.2d 405 (1976), the Supreme Court itself said that

> [w]hile we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Id. 96 S.Ct. at 1160-61.

Paul makes clear that reputation alone is not a protected liberty interest. In a discharge-from-employment case, an employee's liberty interest is infringed only when the government's defamatory charges stigmatize the employee in connection with his future employment opportunities. *Id.*, 96 S.Ct. at 1164-65.

In the years following the *Paul* opinion, the Court has made it even clearer that charges that are only defamatory do not of themselves implicate liberty interests; the charges must be stigmatizing. In *Codd v. Velger*, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Supreme Court repeatedly used the word "stigma" or a variant of that term to explain the plaintiff's burden in a liberty-interest case. Although the court at one point characterized the impression the employer must make as "false and defamatory," "defamatory" as used in context requires that those defamatory charges be stigmatizing. *Id.*, 97 S.Ct. at 884. In *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 83, 98 S.Ct. 948, 951, 55 L.Ed.2d 124 (1978), the Court continued to recognize the right to a good reputation as protected only against charges that so stigmatized the plaintiff that her opportunities to a career in her chosen profession were substantially impaired. Furthermore, the Court characterized its holding in *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), where a policeman was discharged for alleged defamatory reasons, as not amounting to "a stigma infringing one's liberty." *Id.* 98 S.Ct. at 952.

In turning to our cases, I am thoroughly persuaded that, on the whole, we have faithfully followed the Supreme Court concept that a plaintiff must show that he has been stigmatized. In *Ball v. Board of Trustees of Kerrville Independent School District*, we stated that for a charge to be stigmatizing it must be worse than merely adverse; it must be such as would give rise to a "badge of infamy," public scorn, or the like. 584 F.2d 684, 685 (5th Cir.1978) *cert. denied*, 440 U.S. 972, 99 S.Ct. 1535, 59 L.Ed.2d 788

(1979). "To establish . . . a due process deficit, [the plaintiff] must establish that in the course of terminating his employment, the agency prepared a report, without giving him notice and an opportunity to be heard, which was (a) false, (b) stigmatizing and (c) published." *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir.1979) (footnote omitted). "A constitutionally protected liberty interest is implicated only if an employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities. *White v. Thomas*, 660 F.2d 680, 684 (5th Cir.1981) (citing *Codd v. Velger*). "A party does not have a liberty interest in his reputation protected by the fourteenth amendment unless he can establish that the governmental employer's charges against him rise to such a level that they create a badge of infamy which destroys the claimant's ability to take advantage of other employment opportunities." *Evans v. City of Dallas*, 861 F.2d 846, 851 (5th Cir.1988).

I do not contest the majority's observation that the precedents are sometimes inconsistent and somewhat confusing. On at least two occasions our court appears to revive the *Roth* dichotomy of reputation and stigma by stating that "[t]o establish a liberty interest, an employee must demonstrate that his government employer has brought false charges against him that 'might seriously damage his standing and associations in his community,' *or* that impose a stigma or other disability 'that forecloses freedom to take advantage of other employment opportunities.' " *Wells v. Hico*, 736 F.2d 243, 256 (5th Cir.1984)

(*quoting Roth*) (emphasis added). See also *Campos v. Guillot*, 743 F.2d 1123, 1125 (5th Cir.1984) (quoting same language from *Roth*). In both *Wells* and *Campos* the court was quoting from *Roth* without adverting to the later fusing of reputation with stigma in *Bishop* and *Paul*. However, both the *Wells* and *Campos* panels implicitly acknowledged the merger when each went on to restate the proposition of *Paul* that reputation alone is not a constitutionally protected interest, even though state law may create an action for defamation. *Wells*, 736 F.2d at 256; *Campos*, 743 F.2d at 1125. Thus, the conclusion I reach is that our precedents, when read as a whole, plainly require a plaintiff to prove more than that the governmental employer's charges were defamatory; he must prove that they were *stigmatizing*, and, specifically, that they were so damaging as to foreclose employment opportunities.

The majority, on the other hand, by choosing the word "defamatory," in footnote 2, takes several steps back through the cases to *Roth* and suggests that harm to general reputation infringes a protected liberty interest. Because I believe that the state of the law today makes a perfectly clear distinction between "defamatory" and "stigmatizing," and that a liberty interest of an employee is infringed only when the government makes charges that place a stigma upon him that forecloses other employment opportunities, I would choose "stigmatizing," not "defamatory," to describe the nature of the charge that implicates a liberty interest. I therefore respectfully dissent from the inclusion of footnote 2 in this opinion.

B.

I further part company with my distinguished brothers in their holding that Rosenstein may recover damages for general loss of reputation. In my view, such a holding – for which the majority acknowledges there is no case authority – is clearly contrary to *Paul v. Davis*, 424 U.S. 693, 696, 96 S.Ct. 1155, 1158, 47 L.Ed.2d 405 (1976), and *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

The majority acknowledges in footnote 1, as it must, that reputation alone is not a constitutionally protected interest; only damage to reputation that results in a loss of a more substantial interest, such as the loss of employment opportunity that is involved here, is actionable under the Constitution. *Paul*, 96 S.Ct. at 1161. I should think, therefore, that the majority would acknowledge the fundamental principle that constitutional damages must flow from the constitutional right infringed. Since *Paul* makes clear that the City of Dallas did not infringe any constitutional right of Rosenstein when it damaged his general reputation apart from his substantial interest in employment, it is difficult to see how he can collect damages from the city for no legally recognizable wrong that was committed against him.

Even if, however, this logic is unpersuasive to the majority, it should be persuaded by the United States Supreme Court's holding in *Carey v. Piphus*:

> In order to further the purpose of section 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question – just

> as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

Id., 98 S.Ct. at 1050. The rule is simple. We must fit the remedy to the right protected. The right protected is not reputation, but the liberty to seek employment opportunities without improper government interference. Thus, if we are faithful to *Carey*, we can only allow compensation that results from damages suffered from the impairment of that right.

Of course, under this rule, the plaintiff effectively recovers for harm to reputation, but he recovers only for a particular and special harm done to his reputation, that is, the harm that causes loss of job opportunities. Such a result flows directly from *Paul* and *Carey: Paul* specifically holds that one's constitutional liberty rights are violated only when the government harms one's reputation in connection with the loss of a more substantial interest, here, the right to earn a living; *Carey* specifically holds that under section 1983 compensation should be tailored to redress losses for violation of the particularized constitutional right. Because I believe that the majority cuts a back door in the case law to collect damages when the front door was closed by *Paul*, and because I believe that the majority closes its doors on the rule established in *Carey*, I respectfully dissent from the majority's allowing recovery for damage to general reputation.

C.

In conclusion, because the majority opinion, both in footnote 2 and in its creating recovery for all damage

done to reputation, erodes distinctions, drawn by Supreme Court authority and by our authority, between common law defamation and deprivation of liberty under the Constitution to earn a living in one's chosen line of work, I dissent.

Howard M. ROSENSTEIN,
Plaintiff-Appellee,

v.

The CITY OF DALLAS, TEXAS, and
Donald Milliken,
Defendants-Appellants.

No. 87-1888.

United States Court of Appeals,
Fifth Circuit.

May 14, 1990.

Appeal from the United States District Court for the Northern District of Texas; Jerry Buchmeyer, Judge.

Before CLARK Chief Judge, GOLDBERG, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH and DUHE, Circuit Judges.

PER CURIAM:

The en banc court reinstates the opinion of the panel majority (876 F.2d 392) with the following exceptions: footnote 2 and the writing and footnotes under "Damages." The only objection made by any appellant to the damage award, or to the form of submission of the damages to the jury, was to the punitive damages awarded against Donald Milliken. Other errors, if any, in the submission and award of damages, have been waived. *See Galtieri v. Wainwright*, 582 F.2d 348, 352 n. 8 (5th Cir.1978); *Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir.1985).

The judgment against Donald Milliken is reversed and the claim against him is dismissed. The district

court's judgment against the City of Dallas is in all respects affirmed.

REVERSED IN PART, AFFIRMED IN PART.

JERRY E. SMITH, Circuit Judge, with whom CHARLES CLARK, Chief Judge, GEE, GARWOOD, and EDITH H. JONES, Circuit Judges, join, dissenting:

The majority fundamentally errs in asserting that plaintiff Howard Rosenstein requested a name-clearing hearing following notice of his termination. The record is wholly devoid of anything that would have put the City of Dallas on notice that Rosenstein was seeking anything more than an appeal for the purpose of overturning his termination. As the principle of fair notice runs throughout our jurisprudence, it is surprising that the majority would treat the concept of notice so casually in the instant context.

It is axiomatic that a terminated public employee must affirmatively request a name-clearing hearing in order to be entitled to one. Most recently, for example, in *Rathjen v. City of Houston*, 878 F.2d 836, 840 (5th Cir.1989), this court observed that "*Perry v. Sinderman[n]*, 408 U.S. 593, 603, 92 S.Ct. 2694, 2700, 33 L.Ed.2d 570, 580 (1972) holds only that an employee is entitled to a hearing if he requests one. . . ." Similarly, in *Campos v. Guillot*, 743 F.2d 1123, 1126 (5th Cir.1984), we noted that "a discharged public employee is entitled to a 'name-clearing' hearing . . . when he requests such a hearing." The panel opinion that the majority substantially adopts indeed recognizes that a name-clearing hearing must be requested. *Rosenstein v. City of Dallas*, 876 F.2d 392, 396 (5th Cir.1989) (citing *Campos*, 743 F.2d at 1126).

The majority gives scant attention to this issue, however. It concludes, incorrectly, that the request for an appeal of the decision to dismiss is always tantamount to a request for a name-clearing hearing.[1] No authority is cited for this bold proposition, which is undermined by the majority's own legal analysis and supported only by its *ipse dixit*.

Early in its opinion, the majority correctly and carefully explains that an appeal of a dismissal, on the one hand, and a name-clearing hearing, on the other hand, are clean different things: "[T]he process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee." 876 F.2d at 395 (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 n. 12, 92 S.Ct. 2701, 2707 n.12, 33 L.Ed.2d 548 (1972)). Rosenstein requested only that the decision to dismiss him be reviewed; he never hinted that he desired a name-clearing hearing as well.

An appeal is an adversarial proceeding resulting in a decision to uphold or reverse disciplinary action. In a name-clearing hearing, on the other hand, the employer need not produce any evidence, as nothing is to be proved or decided; the employee is merely given a public

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[1] "An employer's denial of an employee's request to appeal the employer's discharge decision, which rested on guilt of the stigmatizing charge, is a denial of a name-clearing hearing unless the employer specifically notifies the employee of the availability of an alternative procedure, which will provide the employee with a public forum to clear his name before the governing body that discharged him." *Rosenstein*, 876 F.2d at 396.

opportunity to present his or her side of the story. The city's written provisions that Rosenstein claims he was trying to invoke are geared toward reconsideration of the disciplinary decision; nothing about them suggests that they are designed to afford a name-clearing opportunity; nor is there any evidence that the city would have refused a name-clearing proceeding if Rosenstein had intimated that he wanted one.

As the majority notes, *id.* at 396, Rosenstein's letter stated, in pertinent part, "I was fired . . . for something that I did not do. . . . I hereby request an appeal from this decision." Rosenstein never even requested a *hearing*, much less intimated that he wanted anything resembling a *name-clearing* hearing.

The issue, of course, is whether the city was on fair notice that Rosenstein made the request that the law requires. His case might be stronger if he had made a more general plea for redress. Instead, he made a specific request for an *appeal*, lending the recipient reasonably to conclude that such relief was being requested to the exclusion of other relief.[2]

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[2] To use a common analogy, Rosenstein specifically requested an apple but is deemed by the majority to have requested an orange. Or perhaps more appropriately, he requested an apple, is deemed to have requested an apple and an orange, and is being given by this court a gold Rolex watch.

To the contrary, however, the proper construction of Rosenstein's letter calls for the application of the rule *"expressio unius est exclusio alterius"* – i.e., "the expression of one is the

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At oral argument, Rosenstein's counsel relied in part upon the fact that Rosenstein's letter disputed the charges against him. The suggestion is that such statement implied a desire to "clear the air" regarding the stigma of the allegations. To the contrary, however, in the context of public employee law in Texas, Rosenstein's denial of the accusations underscores the fact that only a formal appeal of his dismissal is what was being sought.

In Texas, the general statute providing for appeals by police officers and firefighters from disciplinary actions, in cities with populations of 10,000 or more that have

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exclusion of others," *See, e.g., United States v. Wells Fargo Bank,* 485 U.S. 351, 357, 108 S.Ct. 1179, 1183, 99 L.Ed.2d 368 (1988).

> Drawing an inference of an intent to exclude a particular result from the failure to expressly proscribe that result is the essence of the common law maxim 'expressio unius est exclusio alterius,' often applied as an aid in statutory construction. The maxim embodies a sensible insight into the customary manner in which language is used to communicate ideas. Simply stated, '[i]t expresses the learning of common experience that generally when people say one thing they do not mean something else.' 2A C. Sands, *Statutes and Statutory Construction* § 47.24 (4th ed. 1973). . . .

Duke v. University of Tex., 663 F.2d 522, 526 (5th Cir. Dec.1981) (citations omitted) (quoted in *Quarles v. St. Clair,* 711 F.2d 691, 699 n. 22 (5th Cir.1983)). While Rosenstein's letter is not a statute, the question of whether the city had fair notice should be analyzed in terms of such a customary rule for interpreting the written word.

adopted the statutory scheme by referendum,[3] is Tex.Loc.Gov't Code Ann. § 143.010(b) (Vernon 1988).[4] That provision requires that "[t]he appeal must also contain a statement denying the truth of the charge as made. . . . " Significantly, the requirement is jurisdictional. *City of Temple Fireman's & Policemen's Civil Serv. Comm'n v. Bender*, No. C-9670, 1990 Tex. LEXIS 60 (Apr. 25, 1990); *City of Plano Firefighters' & Police Officers' Civil Serv. Comm'n v. Maxam*, 685 S.W.2d 125, 127-28 (Tex.App. – Dallas 1985, writ ref'd n.r.e.).

Thus, the denial of the truth of the charges can easily be understood as boilerplate, customarily included in letters of appeal because the general statute requires it. To the same effect, although Rosenstein acknowledges that as a probationary employee he was not entitled to utilize the appeal procedures conferred by the Dallas charter and code, he asserts that he was attempting to invoke those procedures in his "appeal" letter. But those procedures, like the scheme set forth in the state statute, deal only with an officer's attempt to regain his job and say nothing about name-clearing devices. Given the context of police appeals in Dallas and Texas, it is wholly unfair for this court to conclude that Dallas city officials were

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[3] Dallas has not so voted. The point, however, is that the vast majority (approximately 60) Texas cities larger than 10,000 in population regularly utilize the procedure, thus explaining general custom and practice in regard to police officers' appeals in Texas.

[4] At the time of Rosenstein's termination, this provision was codified as Tex.Rev.Civ.Stat.Ann. art. 1269m, § 17(a).

reasonably on notice that Rosenstein was requesting a name-clearing hearing.

Correctly, the majority observes that "[a] discharged employee need not use the term 'name-clearing hearing.' " 876 F.2d at 396. Remarkably, the majority then cites *Owen v. City of Independence*, 445 U.S. 622, 626-29, 100 S.Ct. 1398, 1402-04, 68 L.Ed.2d 673 (1980), as a case in which the fired employee "demanded only [an] appeal and was refused on the grounds that the city charter provided for no appellate procedure." 876 F.2d at 396. In fact, however, the letter in *Owen* patently requested name-clearing relief and stands in stark contrast to Rosenstein's narrow demand to have his dismissal reversed. The relevant portion of the letter in *Owen* is reproduced in the margin.[5]

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[5] The letter in *Owen* stated,

> My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.
>
> In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.
>
> Such action by you would be in violation of my civil rights as granted by the Constitution and

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Finally, but importantly, the record in this case reveals that Rosenstein testified that he was aware, when he wrote his appeal letter, that he was entitled to a name-clearing hearing. That is not surprising, given that Rosenstein was, at that time, a law school graduate. The fact that he never made a more specific request for a procedure to which he was knowingly entitled should hardly be charged to the city's detriment.

It is uncontroverted that the only cognizable constitutional interest in this case is the liberty interest of an alleged denial of a name-clearing hearing. That is distinct and separate from the property interest in employment, which Rosenstein, as a probationer, concededly did not have. His letter requested only a reversal of his firing and was so specific that a reader reasonably could only have inferred that he was not making the requisite demand for a name-clearing hearing.

The majority, however, has taken the untoward step of announcing the rule that a request for re-employment, a property interest, shall always be deemed a request for a name-clearing hearing, a liberty interest implicating a procedure with a wholly different purpose. Here, the request for an appeal was a nullity, as Rosenstein, a probationary employee, had no right to invoke the city's

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> Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

445 U.S. at 627 n. 4, 100 S.Ct. at 1403 n. 4.

appeal procedures. *Evans v. City of Dallas*, 861 F.2d 846, 850 (5th Cir.1988) (per curiam). The city officials were justified in ignoring that request as being entirely without legal or practical significance; only by the most bizarre twist of logic could that request be read, in plain English, to connote anything more than it concisely says.

The upshot of the majority opinion is that Rosenstein is rewarded for engaging in an utterly void, useless, and futile act – the attempted taking of an appeal that the law proscribes. Moreover, the majority employs a triple leap of logic: First, Rosenstein is deemed to have requested a name-clearing hearing; second, the city is deemed to have refused his implied request; third, the city is deemed to have a policy or practice of denying name-clearing hearings. Such a policy must be found in order for the city to be liable under 42 U.S.C. § 1983. Yet, absolutely nothing in the record suggests that the city ever – in Rosenstein's case or otherwise – intentionally denied a name-clearing hearing to anyone.

The city did deny Rosenstein's request for reversal, as its probationary provisions patently permitted it to do. Now, in reaching an unexplainable result that suggests unjustified sympathy for a lawyer who knew his rights but failed to pursue them, the majority pronounces that the city, by refusing an appeal that its charter and code forbid, *ipso facto* has violated a constitutional liberty interest by denying a name-clearing hearing that was never requested. This holding undermines our tradition of fair notice before a party can be held accountable and is a misbalancing of the equities, given all of the facts and circumstances of this case. Accordingly, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWARD M. ROSENSTEIN, Plaintiff, v. THE CITY OF DALLAS and DONALD MILLIKEN, Defendant.	§ § § § § § § § §	CA 3-85-2191-R

JUDGMENT

Based upon the verdict of the jury, judgment is entered in favor of the plaintiff, Howard M. Rosenstein, against the defendants, the City of Dallas and Donald Milliken, in the amount of $104,087.10; and judgment is entered in favor of the plaintiff, Howard M. Rosenstein, in the amount of $1,000.00 against the defendant Donald Milliken.

SIGNED this 30th day of April, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HOWARD ROSENSTEIN, Plaintiff,	§	
v.	§	CA 3-85-2191-R
THE CITY OF DALLAS ET AL., Defendant.	§	

ORDER

It was the intent of this Court to enter a written order denying the defendants' Motion for New Trial and their Motion for Judgment NOV and their Motion for Partial Judgment.

Accordingly, for the reasons stated in open court on August 18, 1987, these motions are DENIED. The defendants do have thirty (30) days from the date of this Order to appeal.

SIGNED this 23rd day of October, 1987.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER

(2)

No. 90-238

Supreme Court, U.S.
FILED
AUG 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD M. ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a city police officer, during the investigation of his alleged wrongdoing, writes a "Dear Chief" letter stating "My reputation as a fine police officer . . . [is] now all but destroyed as a result of these false charges", and where the officer, after his discharge writes "I was fired . . . for something that I did not do" and "[I] request an appeal from this decision", and where the police department disseminated false information regarding the charges against the officer to the two Dallas newspapers, both of which gave it broad coverage, has not the officer requested a name-clearing hearing?

2. Where a police chief testifies that he makes all of the policies for a city's police department, where the assistant city manager concurs in this testimony, where the city charter, ordinances, and police code of conduct all provide that the police chief has exclusive right to suspend or discharge any officers, and where the police chief is not only never questioned about his testimony by the city but the city does not raise any issue to the contrary in presenting its case, is it not clear that the police chief is the official policymaker for the city in connection with the denial of a name-clearing hearing to a fired police department employee?

3. Where a city waives all issues relating to damages in a section 1983 case and where, for that reason, all reference to damages has been eliminated from a court of appeals decision, is it not clear that the city has no damages issue for which to seek review?

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No. 90-238

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD M. ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Howard M. Rosenstein, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals is reported at 901 F.2d 61, and is reprinted in the appendix to the petition for writ of certiorari, pp. App. 21-App. 29. The order of the court of appeals granting rehearing is

reported at 884 F.2d 173, and is reprinted in the appendix hereto, p. A.1, *infra*. The opinion of the panel of the court of appeals is reported at 876 F.2d 392 and is reprinted in the appendix to the petition for writ of certiorari, pp. App. 1-App. 20. The judgment of the district court (Pet. App. 30) and order of the district court denying petitioner's motion for new trial, motion for judgment n.o.v. and motion for partial judgment (Pet. App. 31) are unreported.

STATEMENT OF THE CASE

Respondent Howard M. Rosenstein (hereinafter "Rosenstein"), was verbally fired from his position as a probationary Dallas police officer by Chief Billy Prince on Friday, May 10, 1985, for allegedly making obscene and harassing telephone calls to Officer Amy Bradley. On the day of Rosenstein's firing, but *after* it occurred, police Captain Donald Milliken made statements to the two Dallas newspapers. Regarding the charges against Rosenstein, Milliken stated that Rosenstein allegedly made "eight or nine obscene/harassing calls" to an unnamed female officer. Rosenstein was fired because "it's a violation of the law . . . You can't have police officers violating the laws they're sworn to uphold." (Pl. Ex. 35). Milliken also said that Rosenstein was accused of making a series of "obscene and harassing" phone calls. "We looked at it for possible criminal violations, but there wasn't any way to make a case . . . " Also, according to Milliken, a voice analysis confirmed that it was Rosenstein who made the calls (Pl. Ex. 36).

Milliken was acting in accordance with a Dallas Police Department policy and custom of elaborating to the press on charges against disciplined officers, even though the charges might later be overturned (Tr. 233-44, 315-20, 326-28).

On April 28, 1985, during the internal investigation of the charges, Rosenstein wrote a "Dear Chief" letter in which he stated: "This is the first time in my life I must suffer the agony of being accused of something heinous that I did not do" and "My reputation as a fine police officer and good human being are now all but destroyed as a result of these false charges and investigation. My honor and integrity are at stake." (Pl. Ex. 29, A.2-A.6).

Chief Prince's termination letter informed Rosenstein that his [Prince's] decision was "final" (Pl. Ex. 37, A.7-A.8). In spite of this Rosenstein wrote City Manager Charles Anderson a letter saying, in part, that "I was fired . . . for something I did not do" and asking for an appeal (Pl. Ex. 38, A.9). Asst. City Manager Levi Davis [at the time the assistant city manager over the Dallas police department] responded that "the decision of the Chief of Police is final" and that Rosenstein was "ineligible for further appeal rights" (Tr. 68, 114-17, 325, Pl. Ex. 39, A.10). Neither Prince nor Davis ever informed Rosenstein of his right to a name-clearing hearing (Tr. 69, 117). The denial of a name clearing hearing was made pursuant to City of Dallas policy (Tr. 117-18, 325).

Rosenstein then brought this suit, requesting a name-clearing hearing in his Complaint (Tr. 72). He did not receive a name-clearing hearing until the time of trial.

The case went to trial under 42 U.S.C. § 1983 for violation of Rosenstein's constitutional rights and under state law for slander. The jurisdiction of the district court was invoked under 28 U.S.C. § 1343 and under its pendent jurisdiction. At trial the jury returned a verdict in favor of Rosenstein. The district court properly refused to submit Petitioners' proposed jury instructions defining "policymakers" and "official policy" as these were incorrect as applied to the facts of this case. The court also correctly found under the facts of this case that Rosenstein had requested a name-clearing hearing. The City of Dallas failed to object either to the form of the damages question or its submission, Question No. 6 (R. 348), and, thus, waived any objection it might have had to the submission of this question. Further, the City of Dallas did not raise any objection to the damage question in its motion for partial judgment, and for judgment notwithstanding the verdict or, alternatively, for a new trial.

On appeal, a divided panel upheld Rosenstein's damages award. However, all members of the panel agreed that under the facts of this case the Chief of Police was a final policymaker for the City of Dallas (Pet. App. 7-App. 8, App. 13). The court of appeals granted en banc review on September 7, 1989. This had the effect of vacating the panel decision.[1] On May 14, 1990 the en banc court of appeals reinstated the panel majority's opinion, except for footnote 2 and the section of the opinion dealing with damages. Because the City of Dallas waived any

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[1] 5TH CIR. R. 41.3 provides: "**Effect of Granting Rehearing En Banc.** Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and judgment of the Court and to stay the mandate."

error involved with the submission and award of damages, the judgment against the City of Dallas was affirmed (Pet. App. 21-App. 22).

REASONS FOR DENYING THE PETITION

This Court should deny the petition for certiorari because (1) the issues of this case are extremely fact specific and only questions of evidence and factual findings are involved; (2) the court below fully and correctly decided the issues; (3) the court of appeals correctly applied prior rulings of this Court to the facts of this case; and (4) the damage question was not preserved below and has been waived.

1. The Fifth Circuit did not err in affirming the district court's finding of fact that Respondent requested a name-clearing hearing.

There is no doubt, under the record of this case, that Rosenstein was stigmatized by false, widely publicized, charges against him, made in connection with his discharge, thus entitling him to a name-clearing hearing. *See Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

On May 10, 1985, Chief Prince fired Rosenstein because he "made obscene and harassing telephone calls to Officer Bradley's residence." (Pl. Ex. 37, A.8). These charges were made public by a police department spokesman and published in the two Dallas newspapers.

By letter dated May 17, 1985, Rosenstein wrote to the Dallas city manager that "I was fired from the Dallas Police Department for something I did not do." He further "request[ed] an appeal from this decision." (Pl. Ex. 38, A.9). This request to participate in established grievance, appeal or other review procedures to contest false, stigmatizing charges was sufficient to state a request for a name-clearing hearing. A discharged employee need not use the term "name-clearing hearing." *Cf. Owen v. City of Independence*, 445 U.S. 622, 626-29 (1980).[2] Clearly, this put the City of Dallas on notice that Rosenstein was entitled to an opportunity to clear his name.

Chief Prince's letter told Rosenstein that the decision was final. Assistant City Manager Levi Davis' response to Rosenstein was also that the chief's decision was final.[3] In

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[2] The facts of this case bear remarkable similarity to *Owen*. Before being fired Owen wrote the city manager a letter, requesting specification of the charges against him and asking for a hearing, saying, in part, "your . . . discharge of me . . . without a full public hearing . . . will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part." *Owen*, 445 U.S. at 627 n.4. Once fired, Owen's attorney requested an appeal, which request was denied because there was no appeal procedure in the city charter for at will employees such as Owen. *Id.* at 629.

Here, before he was fired, Rosenstein wrote a "Dear Chief" letter decrying the false accusations against him and the damage to his personal and professional reputation (Pl. Ex. 29, A.2). After his discharge he requested an appeal, which was denied because there was no provision for same.

[3] The record is devoid of any method by which Rosenstein could have obtained a name-clearing hearing. Petitioners ask

(Continued on following page)

the absence of instructions to the contrary, Rosenstein's letter requesting an appeal from his firing for something he "did not do" was sufficient to invoke a liberty interest name-clearing hearing.[4]

The district court and the en banc court of appeals made a reasonable construction of Rosenstein's letter to the city manager under the facts of this case to interpret it as a request for a name-clearing hearing.

2. In light of the undisputed testimony that the police chief was the city's policymaker under Texas law, the Fifth Circuit did not err in affirming the district court's finding that the City of Dallas would be held liable for the unconstitutional conduct of the police chief.

The court of appeals correctly determined that the Dallas Chief of Police was a policymaker in respect to the

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(Continued from previous page)

the Court to believe that had Rosenstein specifically stated, "I request a name-clearing hearing", they would have provided him with one. The City put on no evidence to this effect and there is nothing in the record to so indicate.

Furthermore, nowhere in the city charter, police code of conduct or general orders admitted into evidence in the district court is there any provision for obtaining a name-clearing hearing. Respondent logically chose to follow an established method of raising his objections to the police chief's decisions in his attempt to obtain a name-clearing hearing.

[4] Dallas claims that it is entitled to a "fundamental right of reasonable notice" (Pet., p. 2). Yet it cites no cases to support this proposition. Under the facts of this case it clearly had notice that Rosenstein wanted to clear his name. Even after Rosenstein filed his complaint in the district court specifically requesting a name-clearing hearing, the city did not tender one to him (Tr. 72).

decisions to terminate Rosenstein and to not give him a name-clearing hearing. The panel unanimously agreed upon this point and the en banc dissent did not disagree (Pet. App. 7-App. 8, App. 13, App. 22, App. 29).

The police chief set all of the policies for the police department.[5] He was not cross-examined on that statement, nor was any issue raised to the contrary. This alone is enough to establish liability. *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986) (municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances).

The police chief's uncontradicted testimony, coupled with the Dallas City Charter provisions admitted into evidence in the district court, makes it clear that under Texas law, the police chief was the policymaker when it came to firing probationary employees. DALLAS, TEX. CHARTER ch. VI, § 2(3), (4) and (14); ch. XII, § 2(1) (4) (1983) (Pl. Ex. 64 and 59, A.11 and A.14, respectively).

In its petition, the City of Dallas asserts that the city council supervises and controls the police chief. Under the facts of this case that statement is incorrect.[6] The

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[5] Chief Prince testified:

Q: You set all of the policies for the Police Department, do you not?

A. Yes, sir.

(Tr. 313).

[6] The only reference to this possibility is the chief's testimony that in 1980 the city council established a Police Citizen's Review Board to *review* their policies and Internal Affairs Division actions. However, the city council is prohibited by charter

(Continued on following page)

testimony of the police chief and assistant city manager, along with the charter provisions in evidence, leave room for no other conclusion than that the police chief was a policymaker when he fired Rosenstein and denied him a name-clearing hearing.

3. The original panel opinion which discussed damages was vacated. It was reinstated by the en banc court of appeals only as to those issues unrelated to damages. The damages award was affirmed because Petitioner had waived all damage issues. Thus, Petitioner cannot now raise any damage issues before this Court.

The effect of the grant of en banc reconsideration in the Fifth Circuit is to vacate the panel opinion. 5TH CIR. R. 41.3. When the en banc court reinstated the panel opinion as its own, it specifically excluded the writing under "Damages" (Pet. App. 21), thus making the panel's discussion of this point moot and irrelevant.

The en banc court of appeals then affirmed the district court's damages award on purely procedural grounds (Pet. App. 21). Since the Petitioner failed to object to the damages question prior to submission to the jury it waived any error which may have existed. FED. R. CIV. P. 51.

(Continued from previous page)

from interfering with the appointments or subordinates of the city manager. DALLAS, TEX. CHARTER ch. III, § 15 (1983) (Tr. 111-12, Pl. Ex. 63, A.17).

4. The Fifth Circuit's decision neither deviates from the rulings of this Court nor presents any issues of significance that warrant review.

The court of appeals decision correctly follows existing precedent. When *Perry v. Sindermann*, 408 U.S. 593, 603 (1972), held that an employee is entitled to a hearing if he requests one, it did not proscribe a hearing if the employee failed to use some "magic words" to invoke the hearing. Rather, the request for an appeal subsumes the request for a name-clearing hearing and is sufficient to put the employer on notice that one is being requested. *Cf. Owen*, 445 U.S. at 626-629 (Petitioner's pre-termination request for a specification of the charges coupled with his attorney's post-termination request for an appeal of the discharge deemed sufficient to request a name-clearing hearing).

Further, the court of appeals decision is consistent with *Pembaur*, 475 U.S. 469; *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); and *Jett v. Dallas Indep. School Dist.*, ___ U.S. ___, 109 S.Ct. 2702 (1989). In the present case the police chief had final authority to discharge probationary employees, and final authority as to whether or not such discharged employee would receive a name-clearing hearing. Thus, under *Pembaur* the Petitioner is liable for his actions. Assuming, *arguendo*, that the police chief's decisions were subject to review, they were reviewable only by the city manager or the assistant city manager to whom authority to oversee the police department was delegated, and not by the city council as Petitioner asserts. The conduct of the assistant city manager in ratifying the police chief's firing of Rosenstein, denying a hearing, and ratifying the police chief's reasons, was

consequently a final decision on this basis as well. As a final, unreviewable decision, it became municipal policy, subjecting Petitioner to liability. This is consistent with both *Praprotnik* and *Jett*.

Nor is the Fifth Circuit decision contrary to *Paul v. Davis*, 424 U.S. 693 (1976) or *Carey v. Piphus*, 435 U.S. 247 (1978). Rosenstein's reputation was impugned in connection with the termination process, thus raising the conduct from a mere slander to a constitutional deprivation. *Paul*, 424 U.S. at 710. At trial, Rosenstein adduced evidence of the mental anguish he sustained as a result of the denial of a name-clearing hearing, as well as evidence of damage to his professional and personal reputation. These are all actual damages which naturally flow from the unconstitutional conduct of the City of Dallas. Rosenstein clearly is entitled to recover the actual damages he sustained as a result of the constitutional deprivations. *Carey*, 435 U.S. 260-63. Any objection the Petitioner may have had to the inclusion of general reputation damages in the award (Pet., pp. 7, 9) was waived by its failure to object to the district court's charge to the jury.

In summary, the decision of the en banc court of appeals is a very narrow holding, very fact specific to the present case. The decision does not expand municipal liability, nor does it deviate from existing precedent. Rather, it correctly applies prior opinions of this Court to the facts adduced at trial to produce a result consistent with those facts and Petitioner's procedural errors. There is thus no reason for this Court to grant certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

August 1990.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1888

HOWARD M. ROSENSTEIN,

Plaintiff-Appellee,

versus

THE CITY OF DALLAS, TEXAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion June 28, 1989, 5 Cir., 1989, ___ F.2d. ___)

(September 7, 1989)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, and DUHE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

PLAINTIFF'S EXHIBIT 29

Howard M. Rosenstein
6070 Lands End Circle #1032
Dallas, Texas 75231
4/28/85

Billy Prince
Chief of Police
Dallas, Texas 75201

Dear Chief Prince,

This is the hardest and most complicated letter I ever had to write in my life. This is the first time in my life I must suffer the agony of being accused of something heinous that I did not do. It is a pain that is very hard for me to handle. It is only because my best friend on the Police Department (Nancy Cawthon from SouthEast Division) told me you are the type of man who would at least listen to me that I decided to write this letter to you.

My life has been dedicated to public service. In 1980, I founded and directed the first successful rape prevention program at Northern Illinois University. I trained 10 years in the Korean Martial Arts and have taught many Chicago Police Officers. I have lectured at three universities on self defense for woman [sic]. I provided these services at no cost because I was concerned with the rape problem on campus and I perceived the need by the community for such programs.

I graduated with honors from both a top Northern University and Law School. Because of my shock of the way I saw the Chicago gangs tearing apart innocent people, I went to work for the Illinois States Attorney's Office – Gang Crimes Unit. However, I did not have enough political pull so I was unable to obtain a fulltime job with

the unit. At this point, I chose to enter the police profession. I was unsatisfied with the way I saw other lawyers milking people for money. My father has been in the police profession for 37 years and I found it to be the most honorable and noble thing I could do with my life.

The idea of a lawyer that wants to be a policeman is not understood by many. It is something that comes from within a person's soul and certainly has nothing to do with money. I was twice asked to join the Federal Bureau of Investigation by an FBI recruiter agent that came to my law school, but I turned it down because I wanted the stability of working in one area and not shifting from town to town.

I put my heart and soul into working for the Dallas Police Department and graduated third overall in the Academy, second top athlete, and second highest marksman. I helped two people pass the Academy and sacrificed my weekends doing it. In the short time that I have been on the Department I have received two commendations. They are enclosed.

I have not told anyone this yet, but recently I saved three lives from smoke inhalation in two separate incidents while off duty. Ordinarily, I would not go around telling people my good deeds, but my integrity is at stake and I feel I must do so now. These people would be more than willing to relate the incidents to you if you wish.

* * * * *

I requested that a voiceprint test be conducted. I practically had to beg for it, but Captain Milliken of the Internal Affairs Division stated he would not allow the

voiceprint test because he felt they were to unreliable. Please find enclosed the voiceprint research that I attained for you. It was a few days later that I heard they decided to go ahead with a voiceprint. However, as my research indicates, a voiceprint must be done with the subject saying the same words as the suspect. This was not done in my case.

Just last Friday Lt. Muncy and Sgt. Dorman informed me at 4:00 p.m. that the voiceprint results indicated that the voice on the suspect tapes could not be identified as me but that it was similar enough that it could be me. They told me the chain of command was going to recommend termination and that I was to immediately go home. I felt myself dying inside. No one would believe me that I did not commit this act.

When I was first asked to write my "Dear Chief" letter on March 29, 1985, concerning my whereabouts three weeks earlier on March 6th, 7th, and 9th, 8:45 a.m., 8:12 a.m., and 3:10 p.m., respectively, I did not know where I was. The 6th and the 7th were my regular days off, so I assumed I was home alone. I know I was with my girlfriend on March 9th the whole day. I know this because I shave spent every weekend with her for the past 2½ months. My girlfriend gave the Internal Affairs Division a sworn statement that she was with me at that time. She is a fine woman; we have been talking about getting married and she would not lie. With regard to March 6th at 8:45 a.m., it was not until I left Internal Affairs Division and looked at my car records that I was able to determine I was at Champion Ford Motor picking up my car that morning with my roommate. I spent the whole morning with my roommate. We had breakfast together and then

went in his truck to Champion Ford. My car was being serviced for an oil change. We were at the service station for over an hour and did not leave until after 9:00 a.m. The reason we were at the service area so long was because I didn't realize one had to pay for the oil change before they brought the car up front. Luckily, the service manager remembered me and also gave a sworn statement to the Internal Affairs Division along with my roommate. I do not have a copy of my girlfriend's sworn statement because I was not given a copy.

Chief Prince, I do not know Amy Bradley other than working in the same station with her. I have never had her phone number nor did I ever have any desire for her phone number. I have never had any contact with this officer except that on one occasion she covered my partner (Rick Wilson) and myself on a suicide. I've said "hi" in the hallways in the police station to this officer just like I say "hi" to any other officer.

* * * * *

I have heard these tapes. The man speaking uses phrases that I have never used in my life. He used the phrase *"we need to sit down and figure this out"*. In his use of the word "figure" it sounds as if he drops the "re" from the word. I have never spoken like that.

In all fairness to myself and to you, I must relay the following event to you. During my second phase of training my Field Training Officer Harry Morrell took me on duty into a place called "Sugars" on Greenville Avenue. It is a nude dancing place and I had never been in it before. While I was standing next to my FTO, a waitress came up to me, pointed at me and stated "You're the one from

Chicago – you need to wait here until the dancer is finished because she wants to talk to you." The waitress then pointed to a dancer. I immediately relayed to my FTO the conversation. We never got a chance to find out how this dancer knew me nor why she wanted to talk to me because we ended up arresting a man there for public intoxication. For the next couple days, I asked myself 100 times how it could be possible for this dancer, that I have never seen before, to know about me. It was not until later that I found out two NorthEast Dallas Police Officers were in that establishment talking to the dancers about me earlier. Two days after the incident I got off of work and decided to find out from this dancer who was talking about me and how she knew me.

While I was waiting for this dancer to finish and talk to me, the management called the police stating there was a possible police impersonator. I've enclosed the memorandum concerning the incident by Sergeant Young.

* * * * *

My reputation as a fine police officer and good human being are now all but destroyed as a result of these false charges and investigation. My honor and integrity are at stake. I ask you to please believe me. I have never lied to anyone on this department. All I ask is to get me away from the NorthEast Division and transfer me to SouthEast to work with Nancy Cawthon and my friend, Jude Braun.

Sincerely,

Howard Mark Rosenstein
Dallas Police Officer
NorthEast Division

[Deletions in letter made prior to its admission.]

PLAINTIFF'S EXHIBIT 37

CITY OF DALLAS

May 13, 1985

Mr. Howard M. Rosenstein
6070 Lands End Circle
Dallas, Texas 75231

Dear Mr. Rosenstein:

Pursuant to the authority vested in me as Chief of Police by the Charter of the City of Dallas, I hereby discharge you from your employment as an employee of the Dallas Police Department, effective close of business May 10, 1985.

I have taken this action because you violated Chapter IV, Section 4.3, of the Police Code of Conduct, which reads as follows:

POLICE CODE OF CONDUCT

CHAPTER IV – PROFESSIONAL CONDUCT AND PERSONAL BEARING

4.3 No employee shall engage in any personal conduct or act which, if brought to the attention of the public, could result in justified unfavorable criticism of that employee or the Department. No employee shall be involved personally in disturbances or police incidents to his discredit.

On March 6, 1985, at approximately 8:45 a.m., Officer Amy B. Bradley, #5011, received two telephone calls during which the caller made obscene sexual remarks. On March 7, 1985, at approximately 8:12 a.m., Officer Bradley received two more calls. During the first, call the suspect said nothing. During the second call, the suspect again made obscene sexual remarks. On March 9, 1985, at

approximately 3:10 p.m., Officer Bradley received a total of seven (7) telephone calls in which the content ranged from sexual overtones to general conversation. Officer Bradley tape recorded the calls made on March 9, 1985, and turned the tape over to her supervisor. Officer Bradley stated at that time that she suspected you were the person making the calls.

On April 12, 1985, a voice identification comparison was made comparing the tape recording that Officer Bradley had made of the March 9, 1985, calls to her residence and a tape recording of a conversation between you and Investigator C. M. Coit of the Internal Affairs Division that occurred on March 12, 1985. The results of the comparison revealed that the voice of the suspect making the calls to Officer Bradley's residence and your voice were the same. In summary, you were the person making the calls to Officer Bradley's residence.

You violated Chapter IV, Section 4.3, of the Police Code of Conduct, when on March 6, 7 and 9, 1985, you made obscene and harassing telephone calls to Officer Bradley's residence.

Because you were a probationary employee of the Dallas Police Department, my decision in this matter is final.

Sincerely,

/s/ Billy Prince
Billy Prince
Chief of Police

JLC

PLAINTIFF'S EXHIBIT 38

May 17, 1985

Mr. Charles S. Anderson
Dallas City Manager
1500 Marilla Street
Dallas, Texas 75201

Dear Sir:

On May 10, 1985, I was fired from the Dallas Police Department for something that I did not do. I received the formal written confirmation of my termination from Chief Prince on May 14, 1985. I hereby request an appeal from this decision. I may be contacted at the address and phone listed below.

Respectfully submitted,

Howard Mark Rosenstein
6070 Lands End Circle #1032
Dallas, Texas 75231
(214) 739-6455

PLAINTIFF'S EXHIBIT 39

May 21, 1985

Mr. Howard M. Rosenstein
6070 Lands End Circle, #1032
Dallas, Texas 75231

Dear Mr. Rosenstein, Certified: 701-562

Your request to appeal your termination from the City of Dallas Police Department was received in the City Manager's Office.

However, as stated in Chief Prince's letter of May 13, 1985 in accordance with the Police Code of Conduct the decision of the Chief of Police is final. You were a probationary employee and therefore ineligible for further appeal rights.

Sincerely,

/s/ Levi H. Davis
Levi H. Davis
Assistant City Manager

mk

cc: Civil Service
City Personnel
City Secretary
City Attorney
Police Department

PLAINTIFF'S EXHIBIT 64

CHAPTER VI. THE CITY MANAGER

SEC. 1. APPOINTMENT; REMOVAL; COMPENSATION.

The council shall appoint a city manager, who shall be the chief administrative and executive officer of the city. The manager shall be chosen by the council solely on the basis of his executive and administrative training, experience and ability, and without regard to political consideration, and need not, when appointed, be a resident of the City of Dallas or the State of Texas. No member of the council shall, during the time for which elected, be chosen as city manager. The city manager shall not be appointed for a definite fixed time, but shall be removable at the will and pleasure of the council upon a two-thirds vote of the members of the council unless otherwise provided by contract. He shall be given at least 60 days' notice prior to his removal from office. If removed after serving three months he may demand written charges and the right to be heard thereon at a public meeting of the council prior to the date on which his final removal shall take effect; but pending such hearing the council may suspend him from office. The action of the council is suspending or removing the city manager shall be final, it being the intention of this Charter to vest all authority and fix all responsibility for such suspension or removal in the council. The city manager shall receive such compensation as may be fixed by the council. (Amend. of 6-12-73, Prop. No. 13; Amend. of 4-3-76, Prop. No. 4)

SEC. 2 POWERS AND DUTIES OF THE CITY MANAGER.

The powers and duties of the city manager shall be as follows:

(1) To be responsible to the council for the proper administration of all the city affairs placed in his hands, and shall to that end appoint and employ all directors of departments and other employees not otherwise provided in this Charter or by ordinance. Appointments made by him shall be on the basis of executive and administrative experience and ability and of training fitness and efficiency of such appointees in the work which they are to administer. All such directors of departments shall be immediately responsible to the city manager and may be removed by him at any time. In case of removal after six months service, if the director removed so demands, a written statement shall be made by the city manager of the reason of his removal, and the director shall, if he so demands, be given a public hearing by the council before the order removal is made final. The statement of the manager and any written reply of the director thereto shall be filed as a public record in the office of the city secretary.

(2) To see that all laws and ordinances are enforced.

(3) Except as otherwise provided by the Charter of the City of Dallas, to appoint and remove all heads of departments and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone, and in the classified civil service all appointments shall be subject to the civil service provisions of this charter.

(4) To exercise control over all departments and subdivisions thereof created by the Charter, or that may hereafter be created by the council, except as hereinafter provided.

* * * * *

(14) In the absence or inability of the city manager, his duties, including the execution of legal instruments, shall be performed by the assistant city managers in the order of precedence as may be designated by city ordinance, and the city manager may designate any of the assistant city managers to perform any of the powers and duties imposed on the city manager by this Charter. (Amend. of 4-3-76, Prop. No. 4)

[Excerpted by Respondent.]

PLAINTIFF'S EXHIBIT 59

CHAPTER XII. POLICE DEPARTMENT

SEC. 1. CREATION OF POLICE DEPARTMENT; PERSONNEL.

There is hereby created a police department of the City of Dallas at the head of which shall be the chief of police. The police department shall be composed of the chief, whose office is hereby created and established, and other unclassified positions of assistants, limited to the two grades or ranks immediately below the grade or rank of chief, and classified employees as the council may provide by ordinance upon recommendation of the city manager. The chief of police shall designate the order of succession of the assistant chiefs, who shall perform the duties of the chief in the event of his disability, absence from the city or inability to perform his duties from any other cause. The designated person shall receive no additional compensation for performing the duties of chief of police. (Amend. 6-12-73, Prop. No. 26)

SEC. 2. DUTIES.

The chief of police shall:

(1) have immediate direction and control of the police department, subject to the supervision of the city manager, and also subject to such rules, regulations and orders as the city manager may prescribe, not in consistent with the ordinances of the city, and shall promulgate all orders, rules and regulations for government of the police force:

(2) devote his entire time to the discharge of his official duties, and shall not be absent from the city except in the performance of his official duties, unless granted a written leave of absence by the city manager;

(3) keep his office open at all hours, day and night, and either he or his subordinate shall be in constant attendance of such office;

(4) prescribe the uniforms and badges for the members of the police force and direct the manner in which the members of the said force shall be armed;

(5) perform such other duties as may be required of him by the city manager or by ordinance of the city council.

* * * * *

SEC. 4. SUSPENSION OF POLICE; HEARING.

The chief of police shall have the exclusive right to suspend for a definite time or discharge any of the officers or employees who may be under his jurisdiction and control for incompetence, neglect of duty, immorality, drunkenness, or failure to obey orders given by the proper authority, or the orders, rules and regulations promulgated by the chief of police. If any officer or employee be suspended or discharged, as herein provided, the chief of police shall forthwith in writing certify the fact, together with the cause for the action, to the city manager. The officer or employee suspended or discharged shall have five days from receipt of notice of such action within which to demand a hearing before the city manager, but such demand must be made in writing. If demanded, the city manager shall proceed to inquire

into the cause of the suspension or discharge and render judgment thereon, which judgment, if the charge be sustained, may be suspension, reduction in rank, discharge, or such modification or amendment as to him may seem just and equitable under all the facts and circumstances of the particular case. Such judgment shall be final unless a discharged officer or employee shall desire to avail himself to the right of a public hearing before a trial board as provided by this Charter. (Amend. of 4-3-76, Prop. No. 5; Amend. of 4-2-83, Prop. No. 7)

[Excerpted by Respondent.]

PLAINTIFF'S EXHIBIT 63

CHAPTER III. CITY COUNCIL

* * * * *

SEC. 15. NO INTERFERENCE BY COUNCIL WITH APPOINTMENTS OR SUBORDINATES OF CITY MANAGER.

Neither the council nor any of its committees or members shall dictate or attempt to dictate the appointment of any person to, or his removal from, office or employment by the city manager or any of his subordinates, or in any manner interfere in the appointment of officers and employees in the departments of administrative service vested in the manager by this Charter. Except for the purpose of inquiry, the council and its members shall deal with that part of the administrative service for which the city manager is responsible solely through such manager, and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager in said departments, either publicly or privately. This section shall not apply to those professional and secretarial assistants provided for in Section 14 of this chapter. (Amend. of 6-12-73, Prop. No. 7)

[Excerpted by Respondent.]

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(3)

No. 90-238

In The

Supreme Court of the United States

October Term, 1990

CITY OF DALLAS,

Petitioner,

v.

HOWARD ROSENSTEIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent Rosenstein attempts to discourage this Court from reviewing this case by stating that "the issues of this case are extremely fact specific and only questions of evidence and factual findings are involved . . . " (Respondent's Brief in Opposition, p. 5). Rosenstein makes this claim but never elaborates on how this case is so fact specific or which factual findings are involved. Instead, he attempts to create confusion and a factual quagmire where they do not exist.

The most obvious example of his attempt to create confusion involves his completely new argument concerning his April 28th letter to the Dallas chief of police.

The City of Dallas has contended all along that Rosenstein was not entitled to a name-clearing hearing because he never requested such a hearing. It is Rosenstein who, at this late stage in the case, attempts to argue a new factual basis for his contention that he requested a name-clearing hearing. In addition, Rosenstein misstates the law regarding policymakers under 42 U.S.C. § 1983 and the law regarding waiver of damages issues. Each of these issues will be addressed below.

A. Rosenstein Improperly Submits a New Factual Basis For His Contention That He Requested a Name-Clearing Hearing.

At the time of his discharge, Rosenstein knew that he was entitled to a name-clearing hearing (*see* TR. 96-97). Despite this knowledge, Rosenstein's May 17, 1985 letter of appeal to the Dallas city manager never once mentioned his desire to have a name-clearing hearing. The plain language of his May 17th letter indicated that he wanted to appeal his discharge.

Because Rosenstein completely failed to make a request for a name-clearing hearing, he was later compelled to take the position that his May 17th letter of appeal to the city manager should have been considered a request for a name-clearing hearing (*see* TR. 96-97). Until now, that has been Rosenstein's position. Now, however, Rosenstein contends that another letter, one written almost two weeks prior to his discharge, should be read together with his May 17th letter of appeal to constitute his request for a name-clearing hearing. There are a number of reasons why this Court should reject Rosenstein's new argument.

First, Rosenstein waived his right to assert that his April 28th letter to the Dallas police chief constituted a request for a name-clearing hearing since he never made that assertion in the lower courts. Ordinarily, this Court does not decide questions not raised or resolved in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Since Rosenstein never raised the issue before, the lower courts never resolved the issue and this Court should not address the issue. Rosenstein waived his right to argue that his April 28th letter to the police chief constituted a request for a name-clearing hearing.

Second, the plain language of Rosenstein's April 28th letter indicates that he was merely seeking a transfer, *not* a name-clearing hearing (*see* PL. Ex. 29, A.6. "All I ask is to get me away from the North East Division and transfer me to South East. . . . "). Rosenstein makes no attempt to explain how his specific request for a transfer should be interpreted as a request for a name-clearing hearing.

Third, Rosenstein's April 28th letter to the chief of police was written *before* he was terminated and *before* any allegedly defamatory statements were made about him. Rosenstein makes no attempt to explain how he could have been requesting a name-clearing hearing before he was discharged and before he was allegedly defamed.

Finally, Rosenstein fails to mention that his April 28th letter to the chief of police was written at the police chief's direction as part of an internal affairs investigation. Rosenstein knows full well that his "Dear Chief" letter was required of him as part of the standard procedure the Dallas police department follows in internal affairs investigations. It was Rosenstein's April 28th "Dear Chief" letter that allowed Rosenstein to tell his side

of the story to the police department prior to any imposition of discipline. Rosenstein makes no attempt to explain how his April 28th "Dear Chief" letter, written as it was in the context of an internal affairs investigation, could have reasonably been understood as a request for a name-clearing hearing.

B. The Dallas Chief of Police Is Not a Policymaker.

The City of Dallas contends that it cannot be held liable under 42 U.S.C. § 1983 for the acts or decisions of its police chief since the chief's decisions are subject to review by the city manager and ultimately by the city council. In response, Rosenstein claims that Dallas City Charter, Chapter III, § 15 (*see* PL. Ex. 63, A.17) prohibits the city council from interfering with the appointments or subordinates of the city manager. Assuming, arguendo, that Rosenstein is correct, it is still undisputed that the police chief's decisions are subject to review by the city manager. According to this Court's decisions in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), the Dallas police chief is not a final policymaker and, therefore, his actions or decisions cannot make the City of Dallas liable under 42 U.S.C. § 1983.

C. The City of Dallas Has Not Waived Any Damages Issues.

The City of Dallas contends: (1) that in an action under 42 U.S.C. § 1983 for denial of a name-clearing hearing, a discharged probationary employee is not entitled to recover damages for general loss of reputation and

(2) that the district court committed plain error by submitting damages issues disjunctively thus allowing recovery for denial of a name-clearing hearing or for slander. In response, Rosenstein claims that the City of Dallas has waived its right to argue any damages issue.

First, Rosenstein never raised this argument before either the district court or the court of appeals. The issue was first raised sua sponte by the court of appeals in its en banc decision. Since Rosenstein never raised this argument before, he cannot rely on it now. *Youakim v. Miller*, at 234. Second, as this Court decided in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), the failure of a city to object to a jury charge concerning damages does not necessarily foreclose the issue from appellate review. In this case both damages issues are significant ones which are likely to effect numerous cities. The issue concerning damages for slander or for a denial of a name-clearing hearing, for example, raises serious concerns of fairness and justice. The result of the lower court's decisions is to allow recovery for slander even though the lower court determined that, as a matter of law, no slander was established. If the award of damages is allowed to stand, it would result in a manifest injustice to the City of Dallas. Such a result calls for review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS P. BRANDT
Assistant City Attorney

September 1990.